

Kansas v. Nebraska & Colorado
No. 126, Orig., U.S. Supreme Court
Decree of May 29, 2003, 538 U.S. 720

Nebraska Crediting Dispute

Non-Binding Arbitration Initiated by Notice of August 28, 2009

State of Kansas, Plaintiff,

v.

State of Nebraska

and

State of Colorado, Defendants

**Notice by Kansas Pursuant to Final Settlement Stipulation §VII.B.6
Re Arbitrator's Final Decision of October 7, 2010**

On October 7, 2010, Arbitrator Martha O. Pagel issued her Arbitrator's Final Decision ("Final Decision") in the Non-Binding Arbitration ("Arbitration") on the Nebraska Crediting Proposal ("Crediting Proposal") initiated by Nebraska's Notice of August 28, 2009, pursuant to the U.S. Supreme Court Decree in *Kansas v. Nebraska & Colorado*, 538 U.S. 720 (2003). The Final Settlement Stipulation ("FSS"), approved by the United States Supreme Court on May 19, 2003 in its Decree in *Kansas v. Nebraska & Colorado*, 538 U.S. 720 (2003), provides for the final step in the dispute resolution process in §VII.B.6 as follows:

Within 30 days of the issuance of the arbitrator's decision, the States that are parties to the dispute shall give written notice to the other States and the United States as to whether they will

accept, accept and reject in part, or reject the arbitrator's decision.

In satisfaction of FSS §VII.B.6, Kansas hereby gives notice with respect to the six Ultimate Findings and Conclusions, Ultimate Findings of Fact/Conclusions of Law, and Findings and Conclusions on pages 6-16 and the seven final conclusions and recommendations on page 17 of the Final Decision, but does so without waiving any position that Kansas has taken, and without accepting or rejecting other specific findings, conclusions or statements of the Arbitrator.

As a general matter, while the Final Decision of the Arbitrator is in favor of the State of Kansas and against the State of Nebraska (Final Decision p. 4), Kansas rejects the Arbitrator's denial of Kansas' Motion to Dismiss and rejects any implication by the Arbitrator that a reasonableness test is applicable to a State's participation in the Republican River Compact Administration ("RRCA") refusal to approve the Crediting Proposal. Subject to the foregoing, Kansas also limits its acceptance of the Arbitrator's eight Ultimate Findings and Conclusions with respect to the eight disputed issues on pp. 6-16 of the Final Decision as follows:

1. "Whether the Crediting Proposal is necessary to avoid double recovery.

Ultimate Findings and Conclusions

Implementation of the Crediting Proposal is not necessary to avoid a double recovery for damages that may be paid by Nebraska to compensate Kansas for past violations of the Compact. The system of evaluating 'running averages' for multiple-year compliance periods established under the FSS establishes a framework for identifying discrete, separate violations for which damages or other remedies may be sought. It is not necessary or appropriate to provide a 'credit' in the FSS accounting procedures for determining compliance in subsequent accounting periods. To do so would

undercut the purposes of the Compact and the complex, but agreed-upon structure of running averages used to determine compliance."

Kansas accepts the Ultimate Findings and Conclusions for Issue No. 1.

2. **"Whether the Crediting Proposal is contrary to the Compact and FSS by allowing substitution of money for water.**

Ultimate Findings and Conclusions

The Crediting Proposal would be contrary to the Compact and FSS by substituting money for water during the years in which a credit would be substituted for actual water use to determine Compact compliance."

Kansas accepts the Ultimate Findings and Conclusions for Issue No. 2.

3. **"Whether the Crediting Proposal is contrary to the Compact and FSS by encouraging future compact violations.**

Ultimate Findings of Fact/Conclusions of Law

Implementation of the Crediting Proposal would not encourage future Compact violations."

Kansas rejects the Ultimate Findings of Fact/Conclusions of Law for Issue No. 3.

4. **"Whether the Crediting Proposal is contrary to the Compact and FSS by depriving Kansas water users of water due them under the Compact.**

Ultimate Findings of Fact/Conclusions of Law

The Crediting Proposal would not deprive Kansas water due to its users in the future if the plan were implemented only for the three compliance periods identified by Nebraska."

Kansas rejects the Ultimate Findings of Fact/Conclusions of Law for Issue No. 4 to the extent that they are inconsistent with Kansas' previously stated positions and accepts them to the extent that they are consistent with Kansas' previously stated positions.

5. "Whether the Crediting Proposal is Incomplete

Findings and Conclusions:

The Crediting Proposal is incomplete, and should not be approved in the form presented to the RRCA."

Kansas accepts the Findings and Conclusions for Issue No. 5.

6. "Whether the Crediting Proposal is Premature.

Findings and Conclusions:

Because of the broad scope of review allowed under the FSS arbitration provisions, the Crediting Proposal is not premature for consideration in this forum."

Kansas rejects the Findings and Conclusions for Issue No. 6.

Subject to the foregoing, Kansas limits its acceptance of the seven Final Conclusions and Recommendations on p. 17 of the Final Decision as follows:

1. "The system of rolling averages and multiple-year compliance periods used for determining Compact compliance was negotiated and agreed to by the States and should be the foundation in any plan for addressing the payment of damages."

Kansas accepts Final Conclusion and Recommendation No. 1.

2. "The system offers each State the flexibility, and responsibility, to first attempt to manage water use in a way that balances overuse and underuse of water during any given compliance period."

Kansas accepts Final Conclusion and Recommendation No. 2.

3. "The system reflects an underlying intent to ensure an equitable distribution of water to each State. In that regard, the States have implicitly placed a

higher value on the receipt of water in compliance with Compact Allocations than on the receipt of damages for Compact violations."

Kansas accepts Final Conclusion and Recommendation No. 3.

4. "The system does not preclude the payment of damages for noncompliance during any two-year or five-year compliance period. The completion of each period triggers a new determination of compliance and gives rise to a separate potential violation, or 'wrong' that would be the basis for a claim seeking damages or other relief."

Kansas accepts Final Conclusion and Recommendation No. 4.

5. "As a result, the system of rolling averages and multiple-year compliance periods does not create the need for a crediting concept such as has been proposed by Nebraska. Although the legal arguments relating to election of remedies appear persuasive at first blush, they do not bear up under a more detailed analysis of the complex and unique structure for determining Allocations and Computed Consumptive Beneficial Use on an annual basis while relying on rolling averages over the two- or five-year periods to determine compliance with Compact obligations."

Kansas accepts Final Conclusion and Recommendation No. 5.

6. "The Crediting Proposal would result in an artificial manipulation of the Tables required for use under the FSS Accounting Procedures. The result would be to deprive Kansas of the ability to seek and obtain full compensation for any subsequent period of noncompliance relying on the manipulated Tables. Conversely, Nebraska would receive on-going, multiple-year benefits from the one-time payment of damages."

Kansas accepts Final Conclusion and Recommendation No. 6.

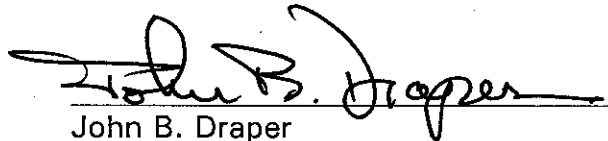
7. "The fact that Nebraska is now on track for future compliance with its Compact Allocations provides an opportunity to focus on the three periods of past violation that Nebraska indicates were intended to be addressed under the Crediting Proposal. Because the extent of these past violations is known and complete at this point in time, the States have an opportunity to consider a one-time negotiated settlement of monetary damages as an alternative to the Crediting Proposal."

Kansas rejects the statement in Final Conclusion and Recommendation
No. 7.

By this Notice, Kansas satisfies its dispute resolution obligations under §VII of
the FSS.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "John B. Draper", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, John B. Draper, hereby certify that on the 1st day of November, 2010, I caused to be transmitted by email a copy of the foregoing Notice by Kansas Pursuant to Final Settlement Stipulation §VII.B.6, addressed to each of the following:

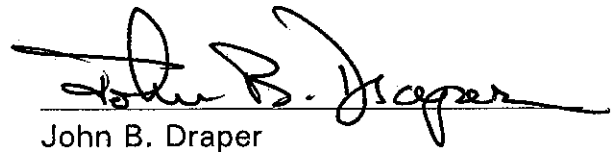
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